Supreme Court, U.S.
FILED

No. _____ 02 514 SEP 30 2002

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In The

Supreme Court of the United States

STUART H. SMITH, JR.,

Petitioner,

versus

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the six month limitation period for presenting claims pursuant to 29 U.S.C. § 160(b) the National Labor Relations Act applies to a contract action brought in a State Court, and is applicable to a claim for breach by the Petitioner, a licensed Merchant Marine Officer and Supervisor, not considered an employee under 29 U.S.C. § 152(3).

Assuming, arguendo, that the six month limitation period in 29 U.S.C. § 160(b) applies to Petitioner's claim, whether Respondent's arbitrary refusal to proceed to arbitration, or cooperate with Petitioner in the production of evidence, in light of the Coast Guard's actions tolled the limitation period.

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties in the Court below:

STUART H. SMITH, JR, Petitioner

THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, Respondent

WATERMAN STEAMSHIP CORPORATION, a corporation having a Collective Bargaining Agreement with the Respondent, INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS.

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United States District Court for the Eastern District of Louisiana, Civil Action 01-1257(T)(1) STUART SMITH, JR. VS. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS Appendix 8-20.

STATEMENT OF THE BASIS FOR JURISDICTION

A. The United States District Court for the Eastern District of Louisiana exercised subject matter jurisdiction over Petitioner's claim pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(b).

B. The Fifth Circuit Court of Appeal exercised jurisdiction over Petitioner's appeal from a final decision of U.S. District Court pursuant to 28 U.S.C. § 1291.

C. SMITH's appeal was timely filed pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure on December 7, 2001, within thirty (30) days after the District Court's Judgment was entered on November 9, 2001.

D. The United States Court of Appeals for the Fifth Circuit rendered its decision on the 17th day of July, 2002.

E. A Petition For Certiorari to this Court has been filed within ninety days of the decision of the Court of Appeals for the Fifth Circuit pursuant to Supreme Court Rule 13(1).

STATUTES INVOLVED

29 U.S.C. § 152(3):

> "(3) The term 'employee' shall include any employee, and should not be limited to the employees of a particular employer, unless the Act [subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act (45 U.S.C. § 151 et seq.) as amended from time to time, or by any other person who is not an employer as herein defined."

29 U.S.C. § 160(b):

> "No Complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the

person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge . . . "

29 U.S.C. § 185(b):

"Any labor organization which represents employees in an industry affecting commerce as defined in this Act (section), and any employer whose activities affect commerce as defined in this Act (chapter) shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT OF THE CASE

On October 3, 1992, Petitioner, a licensed Merchant Marine Officer, was signed on the SS STONEWALL JACKSON as a Third Officer. SMITH was a member in good standing of the INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, an organization having a Collective Bargaining Agreement with WATERMAN STEAMSHIP CORPORATION.

Petitioner's duties included the supervision of activity on the STONEWALL JACKSON'S after deck as the ship was maneuvered from her berth. As the ship turned to head to sea in the Mississippi River, the stern came in

contact with the wharf resulting in damage to the ship and the wharf.

As a consequence of the allision, Petitioner was logged, and his employment terminated for an alleged failure to report distances accurately.

On October 7, 1992, Petitioner contacted the Respondent's Gulf Area Vice President to register a grievance because of the termination of his employment. The grievance was presented to WATERMAN, the employer, and on October 22, 1992, WATERMAN notified Petitioner that the company had not changed its position with respect to SMITH's termination, and refused to reinstate him.

Aware that it was incumbent on him to take all necessary steps to gather all possible evidence to support his grievance, petitioner brought the matter to the attention of the Respondent's General Counsel.

A copy of the Collective Bargaining Agreement, the Grievance Procedure, and subpoenas to compel depositions and production of evidence were requested from the General Counsel. The working agreement was provided on December 31, 1992. However, subpoenas were not issued or made available to Petitioner or his counsel.

An investigation of the casualty was conducted by the Coast Guard Office of Marine Inspection, but no report was issued. A complete investigation report was never produced.

On March 10, 1993, the Respondent's new General Counsel acknowledged that an arbitration hearing had been scheduled, but before a decision would be made to arbitrate the grievance, Petitioner was required to present

all evidence and arguments in support of his claim before arbitration would be set.

Five months passed with no action taken by the Coast Guard to provide a Record of Investigation or by the Respondent to resolve Petitioner's grievance. Obtaining evidence in support of Petitioner's grievance became all the more critical.

On April 5, 1993, counsel for Petitioner advised the Respondent's General Counsel that the Coast Guard Investigation Report had not been made available to the Petitioner despite his best efforts to obtain a copy. The arbitration could not proceed until a complete Coast Guard Investigation Report was in hand.

On April 6, 1993, the Respondent's Gulf Area Vice President advised that arbitration would be deferred until the complete Coast Guard report was available.

On July 9, 1993, Petitioner obtained a portion of the Coast Guard Report of Investigation pursuant to the Freedom of Information Act, and made the documents available to Respondent's General Counsel. The complete record was still not provided.

A request was again made for the issuance of subpoenas to compel production of documents and to compel attendance of witnesses. Subpoenas were requested for crew members of the vessel who were on board the ship in October, 1992, and who were still aboard the vessel in July, 1993.

Petitioner received no response to the request of July 9, 1993, and nothing further was heard with respect to an evaluation of Petitioner's grievance, issuance of subpoenas, or a referral of the matter to arbitration.

In the absence of a commitment by the Organization to work toward a resolution of the grievance, Petitioner had no alternative but to bring suit against Waterman for wrongful discharge. The suit was dismissed on a Motion for Summary Judgment based on a partial Coast Guard Investigation Report, ultimately repudiated by the Coast Guard in June, 1999.

Petitioner was required to bring suit pursuant to the Freedom of Information Act on the basis of the Coast Guard's failure to produce documents and records as requested. The Court entered Judgment for SMITH and against the Coast Guard noting that the Coast Guard's continuing refusal to respond to his request constituted a gross noncompliance with the Act.

Petitioner persisted in his efforts to obtain the complete record. On March 16, 1998, the Coast Guard reopened the investigation, and advised Petitioner that he would have an opportunity to provide information to the Coast Guard to be included in the Record of Investigation.

A corrected Coast Guard Report of Marine Casualty under date of June 30, 1999 was formally issued, and in effect, absolved Petitioner of fault for the allision, while finding the vessel's master responsible for failure to control the ship's movement, which resulted in allision.

ARGUMENT AND REASONS FOR GRANTING WRIT

Petitioner was a Licensed Officer and Member of the Organization in good standing at all material times.

The contract between Petitioner's employer and the Organization defines licensed ship's officers as supervisors and professionals. The National Labor Relations Act, 29 U.S.C. § 160(b) applicable to non-supervisory personnel, does not apply to licensed officers, who are supervisory employees, not subject to the National Labor Relations Act, or the six month limitation period required by 29 U.S.C. § 160(b).

The only issue addressed by the District Court and the Court of Appeal was whether Petitioner's claim against the Organization was time barred by 29 U.S.C. § 160(b).

The Act, 29 U.S.C. § 160(b) addresses Complaints For Unfair Labor Practices and provides:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event the six month period shall be computed from the day of his discharge . . . "

Section 152(3) of the Act identifies those persons covered by the Act, and who are not considered employees or persons covered. Section 152(3) defines the term:

> " . . . the term employee . . . shall not include any individual employed as a supervisor . . . "

29 U.S.C. § 152(11) offers a further definition of the term "supervisor":

> "The term supervisor means any individual having authority, in the interest of the employer, to

> hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment . . . "

29 U.S.C. § 152(12) further defines professional employee as:

> " . . . (a) an employee engaged in work (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes . . . "

The Act clearly defines individuals who fall within the category of covered employees while excluding from this classification, supervisors or professional personnel. While Petitioner was licensed by the Coast Guard and was serving on board an oceangoing vessel as Third Officer, Petitioner did not make a claim or bring an action for Unfair Labor Practice pursuant to 29 U.S.C. § 160(b). Had he done so, the action would have been dismissed.

Section XXI of the Master Collective Bargaining Agreement between the Organization and WATERMAN STEAMSHIP CORPORATION provides:

> "(1) Supervisory and Professional. (a) The duties of officers are set forth in different sections of this agreement are incorporated by reference in this section.
>
> The Parties agree that the duties of the licensed deck officers, including master, shall be maintained in supervisory and professional. It is also agreed that the duties of master, chief officer, second officer, third officer, pilot officer, port relief officer or any other licensed deck officer (including staff captain and first officer, if carried), will not be assigned to any other person, licensed or unlicensed."

The contract identifies licensed deck officers as supervisors, one of the categories of employees not covered by 29 U.S.C. § 152(3). As supervisors and professionals, licensed officers are excluded from coverage under the Act. The courts have consistently held that licensed ship's officers do not fall within the category of covered employees.[1]

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[1] See *A. H. Bull Steamship Co. v. National Marine Engineers Beneficial Association*, 250 F.2d 332 (CA 2 – 1957); *Jensen v. Farrell*, 625 F.2d 379 (CA 2 – 1980); *Spentonbush Red Star Companies v. National Labor Relations Board*, 106 F.3d 484 (CA 2 – 1997); *Hanna Mining Co. v. District II, MEBA*, 382 U.S. 181, 86 S. Ct. 327, 15 L. Ed. 254, 139 N.W.2d 553 (1965); *District II, MEBA v. NLRB*, 353 F.2d 904 (CADC – 1965); *International Organization of Masters, Mates and Pilots v. NLRB and Cove Tankers Corp.*, 575 F.2d 896 (CADC – 1978); *Mon River Towing v. NLRB*, 421 F.2d 1 (CA 3 – 1969); *Dente v. International Organization of Masters, Mates & Pilots, Local 90*, 492 F.2d 10 (CA9 – 1974).

SMITH's claim against the Organization was brought in State Court as a contract dispute with the Organization, and calls for application of the Louisiana Civil Code, Article 3499 dealing with the prescriptive period of ten years for contract actions. As a supervisory employee, SMITH would have been prohibited from bringing a claim under the National Labor Relations Act even if he had wanted to.

Petitioner's grievance was completely ignored by the Organization and Petitioner had no other alternative but to proceed with a civil suit against the Organization which he was entitled to do under 29 U.S.C. § 185(b):

> "Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . . "

It has long been established that an individual may bring suit against an employer for breach of a collective bargaining agreement. Ordinarily, an employee must attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement, and will be bound by the finality provisions of the agreement. However, the rule can work an injustice when a union organization responsible for representation in the grievance/arbitration procedure acts in a dishonest, arbitrary or perfunctory fashion such as was the case in this matter.[2]

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[2] The District Court made a factual finding that the Organization did not pursue Petitioner's grievance for a number of reasons, but also found that the reasons for not bringing the matter to arbitration were not relevant, and the Organization had a duty as the collective bargaining agent to bring the grievance to arbitration.

By requesting numerous documents and by failing to bring the matter to a resolution, the Union acted in a perfunctory fashion, and therefore breached its duty of fair representation.[3]

In those instances where an employee brings suit against an employer under 29 U.S.C. § 185(a), there is no time limitation for bringing the action. 29 U.S.C. § 185(b) also addresses suits for breaches of contract between an employee and his/her labor organization.

In this case, the Organization was contractually obligated to address Petitioner's grievance and when it failed to do so, SMITH had no other alternative but to file suit.[4]

Because 29 U.S.C. § 185(b) contains no prescriptive period, the limitation period is determined as a matter of federal law by application of the State's statute or prescriptive period which in Louisiana is Article 3499 of the Louisiana Civil Code:

> "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription period of ten years. . . . "

The Louisiana Ten Year Limitation Statute for Personal Actions has been held applicable to labor litigation. As a professional and supervisory employee, SMITH did not have the option of bringing an action under 29 U.S.C.

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[3] Findings of Fact, App. 15.

[4] *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967).

§ 160(b), but did have the option of bringing a claim for relief in a civil action.[5]

In *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 163, the Court noted:

> "It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. *Smith v. Evening News*, 371 U.S. 195 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the Collective Bargaining Agreement. *Republic Steel v. Maddux*, 379 U.S. 650 (1961); *Clayton v. Automobile Workers*, 451 U.S. 679 (1981); (Exhaustion of Intraunion Remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provision of the agreement. . . . "
>
> In *Vaca* and *Hines*, however, we recognize that the rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminating, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation. In such instance, an employee may bring suit against both the employer and the union. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v.*

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[5] *Kennedy v. Electricians Pension Plan IBEW NO. 995*, 954 F.2d 1116 (CA 5 – 1992); *Carpenters Local Union No. 1846 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Fransworth, Inc.*, 609 F. Supp. 1302 (EDLA – 1984); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed.2d 476 (1983).

> *Anchor Motor Freight*, 424 U.S. 554 (1976); *United Parcel Service v. Mitchell*, 451 U.S. 561 (1981); *Bowen v. USPS*, 459 U.S. 212 (1983); *Czosek v. O'Mara*, 397 U.S. 25 (1970). . . . "

Del Costello involved a Hybrid case, involving a suit against both the union and the employer. Petitioner in this instance brought the action against the Union in State Court in Louisiana pursuant to the Louisiana Civil Code for breach of contract. Petitioner did not bring suit under the National Labor Relations Act for the reason, that as a Supervisor, he was excluded from coverage of the Act. Had he done so, his suit would have been dismissed.

In *Del Costello*, the Court reversed the Court of Appeals and remanded the case to the District Court to resolve the issue of tolling of the statutes of limitations in reference to a delay in bringing the action. At page 166, the Court noted:

> "He is called upon, within the limitation period, to evaluate the adequacies of the union's representation, to retain counsel, to investigate substantial matters that were not an issue in the arbitration proceedings, and to frame his suit. . . . "

The District Court in the instant case noted the statute of limitations was tolled by the Union's insistence on production of the Coast Guard's Investigation Report which was never produced, notwithstanding a lawsuit under the Freedom of Information Act in which the Court found the Coast Guard at fault.

The Court of Appeals for the Fifth Circuit noted that there is no federal statute of limitations especially applicable to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Where there is no federal statute of limitations, federal courts will normally "borrow" from the most closely analogous state statute.

Petitioner's case is not a Hybrid case as set forth in *Del Costello*. Petitioner, as a Supervisor, could not bring a claim for breach of the duty of fair representation under 29 U.S.C. § 160(b) of the Act. In *Del Costello* the employee was not a supervisor, but an employee to whom the Act was applicable.

The Court of Appeal found that SMITH's status as a supervisor was not relevant because, he brought a suit under 29 U.S.C. § 185(b). The Court noted that 29 U.S.C. § 160(b) applies only to particular causes of action, not to particular types of people. That is to say, notwithstanding the limited application of 29 U.S.C. § 160(b) to nonsupervisory personnel, the finding of the Court is in conflict with the decisions in the Second, Third, and Ninth Circuits which have clearly found licensed officers to be supervisors and not employees under the Act.

In *Del Costello*, petitioner was not a supervisor. There remained an unresolved issue of a tolling of the statute of limitations because of certain requirements of the Union's grievance process. The case was remanded to the District Court to deal with the unresolved issues.

In this case, the District Court and the Court of Appeals addressed the Respondent's recalcitrance in its insistence on petitioner providing the Coast Guard Investigation Report which was never produced, and the impossible requirement that Petitioner prove his entire case

before it would proceed to arbitration. Petitioner was required to retain counsel to investigate the matter, and to obtain evidence before he could frame his suit against Respondent.

Because of Petitioner's status as a supervisor thus not subject to the Act, and because of the unresolved issue of tolling the Statute of Limitations, the Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31436
SUMARY CALENDAR

STUART H. SMITH, JR.,

Plaintiff-Appellant-Cross-Appellee

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,

Defendant-Appellee-Cross-Appellant

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Jul. 17, 2002)

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

On October 3, 1992, Appellant Stuart H. Smith, Jr., was serving as third officer aboard an oceangoing cargo vessel berthed in the Port of New Orleans. Smith was employed by Waterman Steamship Corporation ("Waterman"), the owner and operator of the vessel. On that day, the vessel was undocking when it collided with the dock. The collision caused damage to both the vessel and the dock. Holding Smith responsible, Waterman fired him the following day.

At the time, Smith was a member of Appellee International Organization of Masters, Mates and Pilots ("the Union"), which was party to a collective bargaining agreement between Waterman, among other employers. The agreement contained a grievance mechanism for solving labor-management disputes. Under the agreement, the Union had the right to bring a grievance either on its own behalf or on behalf of a member. The agreement further authorized the Union to pursue arbitration should the grievance procedure provide an unsatisfactory resolution.

On October 7, 1992, Smith contacted the Union and asked it to initiate grievance procedures with respect to his October 4 discharge. He claimed that the discharge was without cause. Smith and the Union, each through counsel, exchanged correspondence regarding the grievance for over a year. During that time, the Coast Guard began an investigation of the October 3 collision. The Union would not pursue Smith's grievance until it had received a complete report of the Coast Guard's investigation, which was not available until the Coast Guard completed its investigation in July of 1999.

In July of 1993, Smith filed a lawsuit against Waterman. On January 11, 1994, the Union sent a letter to Smith's attorney, informing Smith that the Union would not pursue his grievance. According to the Union, Smith had abandoned the grievance procedure by not providing the Union with the Coast Guard's investigation report and by bringing litigation against Waterman on his own.

Smith's lawsuit against Waterman failed on summary judgment. Smith later sought to have the judgment set aside, claiming there had been a fraud upon the court. The

district court denied Smith's motion. Smith then turned to the Union, suing it for failing to pursue his grievance. The Union filed a motion for summary judgment, arguing only that the six-month statute of limitations specified in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), is applicable to this case. The district court ruled Smith's claim to be an action for breach of the Union's duty of fair representation and agreed on the six-month statute of limitations. The district court also ruled that the Union breached its duty of fair representation to Smith. However, because the six-month statute of limitations had long since passed, the district court granted the Union's motion for summary judgment.

Smith appeals the district court's application of the six-month statute of limitations. On cross-appeal, the Union objects to the district court's finding that it breached its duty of fair representation.

I

We review a district court's grant of summary judgment de novo. *See Green v. CBS,* 286 F.3d 281, 283 (5th Cir. 2002). Smith filed this claim pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the district court found Smith's claim to be one for breach of the Union's duty of fair representation. We agree. When a "union representing the employee in the grievance/arbitration procedure acts in . . . a discriminatory, dishonest, arbitrary, or perfunctory fashion," that union breaches its duty of fair representation. *DelCostello v. Int'l Brotherhood of Teamsters,* 462 U.S. 151, 164 (1983). Smith alleges damages arising out of the Union's refusal to pursue the grievance mechanism with respect to his

October 4 discharge. He is clearly stating a claim for breach of the Union's duty of fair representation.

There is no federal statute of limitations expressly applicable to a § 301 claim against an employer or to a fair representation claim against a union. Where there is no federal statute of limitations, federal courts will normally "borrow" from the most closely analogous state statute. *See DelCostello,* 462 U.S. at 158. Sometimes, however, state limitation periods do not provide a satisfactory means of enforcing federal law. Where state rules would be at odds with the purpose and operation of federal law, courts will draw statutes of limitations from either related federal statutes or from the federal common law. *See id.* at 162. This is the case with respect to an employee's suit against his employer and his union, to which the six-month limitations period in § 10(b) applies. *See DelCostello,* 462 U.S. at 155; *Thomas v. LTV Corp.,* 39 F.3d 611, 622 (1994). As a formal matter, these suits are considered "hybrid" suits comprising two separate causes of action. First, the employee alleges that the employer has violated § 301. Second, the employee alleges that the union has breached its duty of fair representation, which the Supreme Court has inferred from the scheme of the NLRA. *See DelCostello,* 462 U.S. at 164.

Given the *DelCostello* decision, the question here is whether the six-month limitations period in § 10(b) should apply to an employee's duty of fair representation claim against a union standing alone. We hold that it should. Although *DelCostello* is limited to hybrid cases, the Supreme Court analyzed the two causes of action separately, comparing each to a state-law analog and dismissing each analog as an unsatisfactory means of enforcing federal law. First, the Court found a claim for legal malpractice to

be the closest state analogy to a federal duty of fair representation claim. *See* 462 U.S. at 167. Nevertheless, the Court dismissed the legal malpractice analogy as inadequate because it "suffers from objections peculiar to the realities of labor relations and litigation." *Id.*

The Court found § 10(b) to be a more suitable source from which to borrow a statute of limitations. *DelCostello,* 462 U.S. at 169. Section 10(b) establishes a six-month period for bringing charges of unfair labor practices to the National Labor Relations Board pursuant to section 8 of the NLRA. 29 U.S.C. § 158. According to *DelCostello,* unfair labor practices are more analogous to breaches of a union's duty of fair representation than any other state parallel. *See* 462 U.S. at 169. Although the Court did not necessarily define all breaches of a union's duty of fair representation as unfair labor practices, it did note that "the family resemblance" between the two types of wrongdoing "is undeniable and that indeed there is a substantial overlap." *Id.* at 170.

The district court did not err in applying § 10(b)'s six-month limitations period to Smith's claim. Smith himself asserts that he brought this claim under § 301, to which § 10(b) certainly applies. *See DelCostello,* 462 U.S. at 158 n.12. Furthermore, the district court correctly characterized it as a duty of fair representation claim. Following the logic of *DelCostello,* such a claim is also subject to the six-month limitations period.

Smith argues that § 10(b) cannot be applied to him because he was a supervisory employee. Smith's status as a supervisory employee is entirely irrelevant here because Smith brought this duty of fair representation claim under § 301. If Smith were a supervisory employee, he would be

excluded from the definition of "employee" under section 2(3) of the NLRA. *See* 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor."). This would preclude him from bringing an action against the Union for violation of § 8 of the NLRA. *See NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980).

Nonetheless, as a statute of limitations, § 10(b) applies only to particular causes of action, not to particular types of people. By its express terms, it applies to § 8 causes of action. *See* 29 U.S.C. § 160(b). It applies to § 301 and duty of fair representation claims by analogy. *See DelCostello,* 462 U.S. at 167. Section 10(b)'s six-month period of limitations applies to Smith's suit against the Union whether or not he was a supervisor. Thus, we affirm the district court's application of the six-month statute of limitations and its grant of summary judgment in favor of the Union.

II

On cross-appeal, the Union's argues [sic] that the district court erred by finding that it breached its duty of fair representation to Smith. The Union argues that the district court made its findings *sua sponte* and without notice in violation of Rule 56 of the Federal Rules of Civil Procedure. *See In re Hailey,* 621 F.2d 169, 171-72 (5th Cir. 1980); *Powell v. United States,* 849 F.2d 1576, 1578-79 (5th Cir. 1988). By affirming the district court's grant of summary judgment in favor of the Union, we render moot the Union's cross-appeal.

III

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	**CIVIL ACTION**
VERSUS	**NO. 01-1257**
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS	**SECTION "T"(1)**

(Filed Nov. 9, 2001)

Before this Court is a Motion for Summary Judgment filed on behalf of the Defendant, International Organization of Masters, Mates and Pilots ("the Union"), pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion came for hearing on September 26, 2001, without oral argument. The Court, having reviewed the memoranda submitted by the parties, the exhibits, the record, and the applicable law, is fully advised on the premises and ready to rule.

ORDER AND REASONS

I. BACKGROUND:

The events giving rise to this action began on or about October 2, 1992, when the Plaintiff, Stuart H. Smith, Jr. ("Smith"), was employed by Waterman Steamship Company ("Waterman") as a third mate aboard the S/S STONEWALL JACKSON. On October 3, 1992, the master of the vessel, Dennis K. O'Laughlin, assigned Smith the duty of reporting the distance between the stern of the vessel and the wharf during an undocking maneuver. The stern of the vessel hit the wharf during the undocking procedure, damaging both the vessel and the wharf. The

next day Smith was terminated. Waterman attests that Smith was terminated for not carrying out his assigned duties.

While employed on the S/S STONEWALL JACKSON, Plaintiff was a member of the collective bargaining unit established under the multiemployer collective bargaining agreement covering offshore vessels then in effect between the Union and various signatory employers, including Waterman. The parties' Master Agreement ("Master Agreement") was first effective June 16, 1982 and was revised and extended by the Union and Waterman from time to time thereafter. The most recent such Addendum insofar as concerns the facts here at issue was a Memorandum of Understanding covering the term July 1, 1990-June 30, 1994. That Master Agreement and all Addenda thereto through June 30, 1994 constitute the entire collective bargaining agreement in effect at all times relevant to this action.

The Master Agreement contained a contractual grievance mechanism for resolving labor-management disputes. Under the Master Agreement, the Union had the right to grieve a dispute either on its own behalf or on behalf of an employee in accordance with the set forth procedures. The Master Agreement further authorized the Union to pursue a grievance to arbitration in the event the grievance process failed to resolve the claim to its satisfaction.

On October 7, 1992, Mr. Smith contacted Arthur Holdeman, Gulf Area Vice President of the Union, and requested that the Union initiate grievance proceedings. Mr. Smith based his grievance on his allegation that his

discharge was without cause. On October 22, 1992, Plaintiff requested that Al Groh, Vice President of the Pacific Area of the Union, schedule a formal hearing concerning the discharge. No action on the grievance was taken until December, 31, 1992, when then general counsel of the Union, Burton Epstein, provided Mr. Smith's attorney with a copy of the Master Agreement, which included the provisions for the grievance procedure.

On March 10, 1993, the new general counsel for the Union, Ernest Cohen, indicated in a correspondence to the Secretary-Treasurer of the Union that Mr. Epstein had actually scheduled an arbitration hearing. However, on that same date in a letter to Plaintiff's counsel, Mr. Cohen informed Plaintiff's counsel that there was a Coast Guard investigation into the allision at issue. Additionally, Mr. Cohen requested from Plaintiff's counsel any and all relevant information the Plaintiff or his counsel may have had regarding the incident.

Because Plaintiff's counsel expressed concerns about attorney/client privilege, Mr. Cohen addressed a further letter to Plaintiff's counsel on March 30, 1993 requesting that Plaintiff himself provide any relevant information directly to Mr. Cohen. By response of April 5, 1993, Plaintiff's counsel stated that his client had not received a copy of the Coast Guard report and requested deferral of the Union's evaluation process if the report was received within thirty days.

On June 21, 1993, Plaintiff's counsel wrote Mr. Cohen to notify him that he had obtained the greater part of the Coast Guard's file and that his client wished to bring the matter to arbitration. In response, Mr. Cohen set forth the manner in which the Union would process the grievance

through the contractual grievance procedures before making a decision as to whether to arbitrate in a letter dated June 28, 1993.

On July 9, 1993, Plaintiff's counsel sent a letter to Mr. Cohen asking him to subpoena personnel members of the S/S STONEWALL JACKSON. Along with that correspondence, Plaintiff's counsel enclosed a copy of the Coast Guard record that was available at that time. Mr. Cohen did not respond to the July 9, 1993 correspondence.

Mr. Smith filed suit against his employer, Waterman, in July of 1993, alleging he was wrongfully discharged. Mr. Smith now alleges that he was forced to bring suit against Waterman because the Union did not commit to a resolution of the grievance. In November of 1993, Mr. Cohen and Plaintiffs counsel corresponded regarding a counterclaim asserted by Waterman in the wrongful discharge suit. The correspondence specifically addressed whether the Union or Waterman had an obligation to provide Plaintiff with a defense to that counterclaim. In a letter dated December 6, 1993. Mr. Cohen advised Plaintiff's counsel that the Union did not have a contractual obligation to provide counsel to the Plaintiff in regard to his defense of Waterman's counterclaim.

Plaintiff counsel's responsive letter of December 13, 1993, claimed that Plaintiff had to pursue his litigation against Waterman because the Union refused to press the grievance on behalf of Mr. Smith. On January 11, 1994, Mr. Cohen informed Plaintiff's counsel that, due to the alleged fact that Mr. Smith did not provide the Union with the complete Coast Guard investigation, and due to the fact that Mr. Smith pursued the matter of his discharge in litigation with Waterman, it was not reasonable for the

Union to take any further action concerning Mr. Smith's grievance.

The complete Coast Guard Marne [sic] Casualty Report into the allision at issue was released by the Coast Guard on July 20, 1999.

On April 12, 2001, Mr. Smith filed the instant suit against the Union alleging that the Union failed to honor the terms and conditions of the working agreement in effect between the Union and the Plaintiff's employer. The Union removed this action to this Court asserting that this Court had original jurisdiction under Section 301(a) of the Labor Relations Act, 29 U.S.C. §301(a).

II. LAW AND ANALYSIS

A. The Law on Summary Judgment

The Federal Rules of Civil Procedure provide that a court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655-56 (5th Cir. 1996) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 912-13 (5th Cir.) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), *cert. denied*, 506 U.S. 832 (1992)). When the moving party has carried its burden under Rule 56(c),

its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis supplied); *Tubacex, Inc. v. M/V RISAN*, 45 F.3d 951, 954 (5th Cir. 1995).

Thus, when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co.*, 475 U.S. at 588. Finally, the Court notes that substantive law determines the materiality of facts, and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Statute of Limitations Applicable to Plaintiff's Action.

The Defendant has filed this motion based on its allegation that the six-month statute of limitations specified in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(b), is applicable to the case at bar. The Defendant argues that Mr. Smith's action is against the Union for breach of the applicable bargaining agreement, and it therefore is an action for breach of the Union's duty of fair representation. *See Richardson v. United Steel Workers of America*, 864 F.2d 1162 (5th Cir. 1989). If this is classified as a duty of fair representation case, the six-month limitations period of section 10(b) of the NLRA applies. *See Delcostello v. International Broth.*

Of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

The Plaintiff asserts that this action does not fall into the category of a duty of fair representation case. Rather, this case, according to the Plaintiff, sounds in contract. If this case is in fact in contract, then Louisiana Civil Code Article 3499 should apply, and the applicable statute of limitations is ten years.

Because the union acts as agent of all the employees, it owes each of them, whether or not a union member, the duty of fair representation. When a union acts as the collective bargaining agent of its members, it is obliged to secure the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. *See Richardson v. United Steel workers of America*, 864 F.2d 1162, 1165-66 (5th Cir. 1989); *citing Vaca v. Sipes* 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967) A union breaches its duty of fair representation when, "the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion." *Delcostello v. International Broth. Of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983); *citing Vaca v. Sipes* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

In his Original Petition for Damages in state court, Plaintiff alleged, "At all material times, the INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS was the collective bargaining agent for its members employed by WATERMAN STEAMSHIP CORPORATION." *See* Plaintiff's Petition for Damages, Paragraph 4. Therefore, taking the Plaintiff's allegations as true, the

Union was the collective bargaining agent for the Plaintiff during the time of the incidents in question.

The Plaintiff alleges in his Petition for Damages that his damages arise out of the Union's refusal to provide legal counsel, or to refer the matter to arbitration. *See* Plaintiff's Petition for Damages, Paragraph's 10, 11, 13, 14. In his Memorandum in Opposition to this Motion, the Plaintiff illustrates his numerous requests for arbitration by the Union. Although the parties exchanged correspondence regarding the grievance, the Union did not pursue Mr. Smith's grievance. The Union alleges that it did not pursue the grievance because Mr. Smith did not produce the investigation findings by the Coast Guard into the allision that led to Mr. Smith's determination. Mr. Smith alleges that he did not produce the investigation findings because the investigation was not completed at the time of the Union's request.

The reason the Union did not bring the matter to arbitration is irrelevant. The Union had a duty as the collective bargaining agent to bring Mr. Smith's grievance to arbitration. By requesting numerous documents, and by not bringing the matter to resolution, the Union acted in a perfunctory fashion and therefore breached its duty of fair representation to Mr. Smith.

The Plaintiff alleges that this case sounds in contract, and that the ten-year prescription period under Louisiana Civil Code Article 3499 should apply. In support of his argument, Plaintiff cites *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116 (5th Cir. 1992), and *Carpenter's Local Union No. 1846 of United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Farnsworth, Inc.*, 609 F.Supp 1302 (E.D. La. 1984). The

Kennedy case involved an action under the Employee Retirement Income Security Act (ERISA). The Court in *Kennedy* determined that the plaintiff's claim was an action to clarify his future rights under ERISA. The Court found that because ERISA did not provide a statute of limitations for actions brought to clarify future rights, the state law applicable time limits were to be used. The state ten year statute of limitations applied because the claim was based on contract. In the case at bar, there is a statute of limitations under the applicable law, that being section 10(b) of the NLRA. In addition, Mr. Smith's claim is neither under ERISA, nor is it for clarification of future rights. The *Kennedy* case is inapplicable to the case at bar.

In *Carpenter's Local Union No. 1846 of United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Farnsworth, Inc.*, the plaintiff unions claimed that they were entitled to a Declaratory Judgment that the defendant employers were obligated in contract to the unions. Because the plaintiffs were praying for a Declaratory Judgment on a contract between the unions and the employers, the Court determined that the ten-year prescription period applied. In the instant case, the Plaintiff is not a union, nor is he asking for Declaratory Judgment. In addition, there is an applicable statute of limitations under section 10(b) of the NLRA. Therefore, *Carpenter's Local Union No. 1846 of United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Farnsworth, Inc* is inapplicable.

C. Time at which the Applicable Statute of Limitations Began to Run.

The Plaintiff alleges that if section 10(b) of the NLRA applies to the case at bar, the statute of limitations period has not commenced because the Union has extended the period in which the matter can be brought to arbitration pending the receipt of the Coast Guard report into the allision. The Union attests that the last piece of correspondence from the Union to Plaintiff's counsel notified Plaintiff that the Union would not bring the matter to arbitration, and therefore the six-month statute of limitations started after the receipt of the last letter.

In the last letter to Plaintiff's counsel date January 11, 1994, the International Counsel for the Union, Ernest Cohen, wrote the following:

> It would appear from the Order of January 4, 1994 that you did not assert contract rights pursuant to the collective bargaining agreement, but chose instead to sue based on common law theories of wrongful discharge. Apparently your choice in this matter was *to waive all claims* pursuant to the collective bargaining agreement with regard to the incident so as to avoid the arbitration provisions of the collective bargaining agreement.

See Defendant's Exhibit L.

Mr. Cohen went on to state:

> Your client made a choice not to provide MMP with the information necessary to determine whether or not to proceed from grievance to arbitration. Given that decision, *it is not reasonable a this stage for MMP to take any further action*

concerning the particular incident involving Mr. Smith.

See Defendant's Exhibit L.

The letter conveys the Union's position of not taking any further action. Therefore, at the time Mr. Smith was notified that his grievance would not proceed any further, the statute of limitations period commenced.

Mr. Smith did not have any further correspondence with the Union after the January 11, 1994, letter until he filed the current suit on April 12, 2001. If Mr. Smith was not notified by the January 11, 1994, letter from Mr. Cohen that his claim was not going to proceed to arbitration, at some point over the next seven years the Plaintiff had to realize that the Union was not bringing the matter to arbitration.

The Plaintiff alleges that his grievance claim with the Union was basically stayed until the Coast Guard Marine Casualty Report into the allision was completed. The Marine Casualty Report is dated July 20, 1999. After the report, there is no record of Mr. Smith attempting to contact the Union in order to proceed with his grievance. Besides his failure to continue with the grievance after the Coast Guard Report, Mr. Smith did not file this lawsuit against the Union until almost two years after the report was released. At some point after the Marine Casualty Report was released, Mr. Smith had to realize that the Union was not bringing his grievance to arbitration.

In his Petition for Damages, the Plaintiff alleges, "The defendant refused to provide legal counsel, or to refer the matter to arbitration." *See* Plaintiff's Petition for Damages, Paragraph 10. In a letter written by Plaintiff's

counsel on December 13, 1993, Plaintiff's counsel stated that Mr. Smith was forced to file suit against his employer because the Union refused to press the grievance on behalf of the Plaintiff. If Plaintiff alleges that his damages are the result of the Union not bringing the matter to arbitration, at some point he had to know that the Union was not going to bring the matter to arbitration. The only way that this suit is timely under the applicable six month statute of limitations is if the Plaintiff was first notified on or after October 2000, that the Union was not bringing his matter to arbitration. Given the fact that the last correspondence with the Union stating that the matter was not proceeding to arbitration occurred on January 11, 1994, the Plaintiff knew his matter was not proceeding to arbitration before October 2000. Therefore, the Plaintiff's action is time-barred.

III. CONCLUSION

For the forgoing reasons, the Court finds that the six-month statute of limitations specified in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(b), is applicable to the case at bar. Because the instant suit was not filed within six months from when he was notified that his grievance would not proceed to arbitration, the Plaintiff's claims are time-barred.

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Doc. 4) be, and the same is hereby **GRANTED** pursuant to Rule 56 of the Federal Rules of Civil Procedure.

New Orleans, Louisiana, this 8th day of November, 2001.

/s/ G. Thomas Porteous, Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE